IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 317

BAY-BRITE LIGHTING, INC., A Corporation,

Appellant,

vs.

STATE OF MISSOURI,

Appellee.

On Appeal from the Supreme Court of Missouri

BRIEF OF AMERICAN FEDERATION OF LABOR AMICUS CURIAE

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STATEMENT

The American Federation of Labor has requested and been granted by the parties leave to file a brief amicus curiae in this case. Its interest lies in the fact that it represents hundreds of thousands of employees who are the beneficiaries of laws in the State of Missouri and in the fifteen other states providing opportunities for workers to exercise their right of suffrage without deductions from pay for time thus lost.

ARGUMENT

THE STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant contends that the statute involved deprives it of its property without due process of law in violation of the Fourteenth Amendment. This Court has many times delineated the permissible scope of state legislation under the due process clause. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Nebbia v. New York*, 291 U.S. 502; *Lincoln Federal Labor Union No. 19129, et al. v. Northwestern Iron & Metal Co., et al.*, 335 U.S. 525; cf. dissenting opinion of Justice Frankfurter in *West Virginia v. Barnette*, 319 U.S. 624. These decisions indicate that the Court, in considering

the validity of the state law in question under the Fourteenth Amendment, is concerned only with the following questions: (A) Is the promotion of a full exercise of the right of suffrage a proper concern of the legislature in that the interest of the public requires such promotion, and (B) Were the means adopted by the legislature reasonably necessary for the accomplishment of its purpose? Both questions must be answered in the affirmative.

A. The Promotion of a Full Exercise of the Right of Suffrage is a Proper Concern of the Legislature.

The states, of course, may legislate on every matter of public concern, *Noble State Bank v. Haskell*, 219 U.S. 104, at 111. It is readily apparent in a democratic form of government that protection and encouragement of the exercise of the right of suffrage is fundamental to the perpetuation of that government. It is unnecessary to dwell upon the virtues of voting or the necessity for casting a ballot. Legislatures have enacted hundreds of statutes covering every phase of the electoral process. A more reasonable field for the legislative purview could hardly be found.

The legislature of the state of Missouri recognized this fact when it enacted Section 11785 in 1897. Sixteen other states have passed similar laws providing for time off for voting without a reduction in pay. Other states have chosen other methods for protection of the full exercise of the right of suffrage.

The Supreme Court of Missouri, when it decided the instant case below, briefly stated the public interest involved, at 240 S.W. (2d) 886, 892.

> "If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also. The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that 'Eternal vigilance is the price of liberty.' For the vast majority the only opportunity to exercise that vigilance is in the polling place."

To this finding, few would take exception. The dissenting judges in the case below did not frame their objections on the right of the state to enact laws to protect the exercise of the franchise, but limited their disapproval to the means chosen by the legislature to carry out this plan.

B. The Means Adopted by the Legislature Were Reasonably Necessary for the Accomplishment of its Purpose.

Whether or not the means adopted by the state of Missouri to assure the fullest participation of its voters in the electoral process were wise is no concern of this court. *California State Automobile Association Inter-Insurance Bureau v. Maloney,* 341 U.S. 105. If the law has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, the requirements of due process are satisfied. The legislature is primarily the judge of necessity of the statute. Every possible presumption is in favor of its validity. It may not be annulled unless palpably in excess of the legislative power. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 398.

To determine the reasonableness of a legislative enactment, it is necessary to view the circumstances existing at the time of the passage of the statute. Any other rule than this, such as determining the reasonableness of the statute by presently existing conditions, would require the court to sit as an arbiter on changing social trends. It would be required to substitute its judgment for that of the legislature on conditions calling for exercise of the law-making power. This is not a judicial function but one peculiarly adapted to the legislature. Thus, if appellant feels that the statute involved is unreasonable by today's standards, it has addressed its appeal to the wrong forum. The legislature of the state of Missouri can amend or repeal this statute any time a majority of its members is persuaded of the necessity therefor.

Section 11785 was enacted in 1897 and remained on the statute books of Missouri from that time to the present.

The fact that this is the first prosecution brought under the Act is of no consequence. If Section 11785 was a reasonable enactment under the conditions existing in 1897, it was a valid exercise of the legislative power and should not be disturbed by any court of law.

Legislators who sat in the Missouri Assembly in 1897 were presumably aware of the social conditions that prompted their action. In that year, throughout the United States, the average hours worked per week by employees in all industry was 59.1 per workingman.[1] In that year, in Missouri, according to Bulletin No. 604, Bureau of Labor Statistics, laborers, blacksmiths, boilermakers, iron molders, printers and cabinetmen worked a maximum of 60 hours per week. In the neighboring state of Kansas, in 1867, stationary engineers worked a maximum of 98 hours, bakery workers 85 hours, farm laborers 112 hours, millwrights 77 hours, coal miners 72 hours, railroad brakemen 84 hours, teamsters 103 hours, and coopers a maximum of 70 hours. The cited source carried no figures available for Missouri, but it is a fair presumption that there was no great dissimilarity. In any event, it is known that the protections against employer excesses and against abuse by employers of their superior economic position were not then what they are today; even where the customary working hours may not have been long enough to interfere with the right of franchise, it was perhaps not unheard of for an employer to require its employees to work extra hours for the very purpose of defeating that right.

Even where the length of his working day was not such as to physically interfere with the right to vote, a workingman heavily dependent upon his earnings to support his family could ill afford a deduction in pay for any reason. Confronted with a choice of refraining from voting or

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[1] Douglas, Paul H., *Real Wages in the United States, 1890-1926*, Houghton-Mifflin Co., 1930.

bringing home a smaller paycheck, many workingmen would stay at their jobs.*

A legislature aware of those facts could hardly be called unreasonable when it undertook to widen the exercise of suffrage by permiting workingmen to absent themselves from employment for a four-hour period during an election day. The means established by the legislature to widen the exercise of suffrage were not only eminently reasonable, but absolutely necessary, if the desired object was to be achieved.

One of the dissenting opinions below, 240 S.W. (2d) 886, 897, states that the privilege accorded by the statute is not one of voting, but the privilege of absence for four hours, and that the employer could be punished for a deduction whether the employee voted or not. Such an argument, however, forgets that no persons are required to vote, but have merely the privilege of voting. The legislature had a right to provide each man with the fullest freedom necessary in which to exercise this privilege of

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* In such case, exhortations such as the following, by those jurists who held a similar statute in the state of Kentucky unconstitutional on the ground that it subsidized what in reality was the workingman's duty, must have fallen on deaf ears.

> "This glorious country belongs to the farmers, to the working people, to the little people whose name is legion, to the middle-sized people who are the salt of the earth, to those of the big people who would yet remain little people because their God-fearing hearts make them humble. No group in America has a greater stake in its government, in its rocks and hills, in its woods and templed hills, than ordinary working men. No group in America can be more interested in voting for a clean, righteous, free statesmanlike government than that group known as workers. The woman with the sunbonnet and the checkered apron who trudges off to the mountain-side in Leslie County and walks down the creek a mile to cast her vote—she is an American queen in calico, but her only pay for voting is the satisfaction of knowing that Columbia, by God's help and hers, shall continue as the gem of the mighty ocean. Let no man cease to thank his God as he looks in at the open door of his voting place, as he realizes that here his quantity, though cast in overalls, is exactly the same as the quantity of the President of the United States. There is a satisfaction and privilege in voting in a free country that cannot be measured in dollars and cents." (*Illinois Central Railroad v. Kentucky*, 305 Ky. 632, 204 S.W., (2d), 973, 9.)

suffrage. Without freedom to go to the polls, the question of whether a citizen chose to vote or not becomes rather academic. The legislature selected the most practical, or certainly a reasonable, means of providing the necessary free time.

The contention made in the dissent below and in other court decisions[3] that such a statute pays a man for voting is equally untenable. The statute does not require paying a person for voting. The statute prohibits a deduction from his wages because of the exercise of the privilege of election-day absence. Neither an employer of salaried employees nor the salaried employee would consider that his four-hour absence was payment for the privilege of voting, although there is no deduction from his monthly salary check. An hourly-paid employee should not be penalized because his earnings are computed in relation to the time actually worked each day.

Payment or not, such a statute necessarily imposes a burden on some party, as long as it be conceded that permitting absence from work is a proper method for carrying out the legislative purpose of promoting the wider exercise of the right to vote. If the employer pays his employees during their absence, he is compelled to suffer a financial loss. If the employee leaves his job to vote and suffers a deduction in pay for the period absent, he is suffering a financial loss. Forced to choose between the two, who is there to say the legislature has made an unreasonable choice in imposing the burden where it could more easily be borne, particularly since the burden placed on the employer is infinitesimal. An employee who worked 60 hours per week in 1897 and absented himself twice for the full four-hour period would still be gone no more than twenty-

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[3] *People v. Chicago, Milwaukee & St. Paul Railway Co.*, 316 Ill. 486, 138 N.E. 155; *McAlpine v. Dimick*, 326 Ill. 240, 157 N.E. 235; *Illinois Central Railroad v. Kentucky*, 305 Ky. 632, 204 S.W. (2d) 973.

five hundredths of one per cent of his annual working time. The employer who worked his teamsters 103 hours per week would suffer even less of a deprivation.

Even judged by today's standards, and as applied to the appellant employer in the case at hand, the burden is minute. The statute as applied does not require that the employer pay for four full hours of an employee's absence. The statute provides only that an employee may be absent for a period of four hours between the opening and closing of the polls. The employer may specify the hours at which the employee may be absent. In this case, Grotemeyer left his job at three o'clock in the afternoon, at his employer's instruction, four hours before the polls closed at seven o'clock. Since his normal working time extended to four thirty p.m., he was actually absent only one and one-half hours. The purpose of the statute to secure four full hours between the opening and closing of the polls, affording a fair opportunity for the casting of a ballot, was thus carried out.

When the small pecuniary deprivation of the employer is placed alongside the public interest to be served by a full and complete electoral process, it becomes even clearer that the legislative action was reasonable in every respect. "(I)t is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." *Noble State Bank v. Haskell*, 219 U.S. 104, 110.

Appellant has relied upon the decisions of the highest courts of Illinois and Kentucky holding similar statutes unconsitutional. The reasoning of those decisions is not persuasive, as neither court gave proper deference to the legislative judgment.

The Supreme Court of Illinois, in 1923, first declared its statute to be unconstitutional. *People v. Chicago, Milwau-*

kee & St. Paul Railway Co., 316 Ill. 486, 138 N.E. 155. That decision was made in an era in which this Court was regularly finding state legislation to be violative of the Fourteenth Amendment's due process clause. *Lochner v. New York*, 198 U.S. 45; *Adair v. United States*, 208 U.S. 161; *Coppage v. Kansas*, 236 U.S. 1; and *Adkins v. Children's Hospital*, 261 U.S. 525, were the prevailing constitutional doctrines of the day. Under the influence of those decisions, it could be expected that the highest court of Illinois would brush aside legislative action when it offended the court's sense of propriety.

But the *Lochner-Adair-Adkins* cases are no longer the ruling law.* Acts of the legislature, when found reasonable, are no longer invalidated because minor deprivations must necessarily be placed on some elements of the body politic for the common good. The Supreme Court of Illinois, properly responsive to the constitutional times, recognized this in 1944 when it handed down its decision in *Zelney v. Murphy*, 387 Ill. 492, 56 N.E. (2d) 754. That case involved the validity of the Unemployment Compensation Act of Illinois,

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*See opinion of Black, J., *Lincoln Federated Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525, at 535:

"The Allgeyer-Lochner-Adair-Coppage constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. . . .

"This Court, beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

The same principles that are applied to state regulation of commercial and business affairs can be applied to regulation of voting, which concerns the preservation of the state itself.

and one of the arguments advanced against its constitutionality was the 1923 Illinois decision in *People v. Chicago, Milwaukee & St. Paul Railway, supra.* In dismissing that decision and one which followed it, the court said:

> "These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends."

The Court of Appeals of Kentucky, in 1947, declared a similar statute unconstitutional as a due process violation. *Illinois Central Railroad v. Kentucky, supra.* With all due respect to the Kentucky court, its reasoning was on a par with its rhetoric. Whether or not the legislative action was within the bounds of reasonable judgment was not discussed. From a careful reading of the opinion, the decision appeared to rest on the court's personal distaste for the law. It was condemned thusly: "It does not seem to be in keeping with the American tradition." The court treated the penalties for pay deduction as a provision for pay for voting and found this highly offensive. The Kentucky decision is neither controlling nor persuasive.

Two other state courts have found similar statutes reasonable enactments of the legislature and have upheld them against charges of unconstitutionality. Those decisions, from New York in *People v. Ford Motor Co.*, 63 N.Y.S. (2d) 697, and California, *Ballarini v. Schlage Lock Co.*, 226 P. (2d) 771, are more nearly in keeping with the constitutional rulings advanced by this Court. Both statutes were affirmed as reasonable enactments of the legislature. Cf. 47 Columbia Law Review 135.

When appellant's argument is contrasted with the reasonable exercise of legislative power, it is no more than an

appeal to constitutional doctrines long ago laid to rest by this Court. The Missouri statute is in no way violative of the Fourteenth Amendment's due process clause. Appellant was properly convicted in the court below.

Respectfully submitted,

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